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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5830

CLOVER PATTERSON,

Appellant,

v.

GEORGE WARNER, Individually and in his official capacity of Justice of the Peace of Kanawha County, Louden District, West Virginia, and GRAHAM MOTOR COMPANY, a corporation,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the United States District Court for the Southern District of West Virginia, entered on September 13, 1972, is unreported, however it is reproduced in the Single Appendix.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1253, which authorizes a direct appeal from a judgment by a three-judge district court denying an injunction restraining the enforcement of a state statute. The Court below was a statutory three-judge panel convened pursuant to Title 28, United States Code, Section 2281, *et seq*, which dismissed appellant's action seeking to hold the requirement of posting a bond double the amount of the judgment in order to perfect an appeal from a judgment rendered by a justice of the peace in a civil action as violative of the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution. The District Court's jurisdiction was invoked pursuant to Title 28, United States Code, Sections 1343, 2201, and 2202, and Title 42, United States Code, Sections 1981, 1983, and 1989.

The District Court judgment was entered on September 13, 1972; appellants notice of appeal was filed on October 24, 1973; the case was docketed in this Court on December 6, 1972, as No. 72-5830; probable jurisdiction was noted March 26, 1973.

PROVISIONS OF THE UNITED STATES CONSTITUTION

Fourteenth Amendment:

Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

West Virginia Code 50-15-2:

The appeal shall not be granted by the justice unless, within ten days after the judgment is rendered or revived or an order is entered refusing to set aside a judgment, bond with good security, to be approved by the justice, in a penalty double the amount of the judgment, is filed with him, with condition to the effect that the person proposing to appeal will perform and satisfy any judgment which may be rendered against him on such appeal by the court to which the appeal is taken as provided in section one [§50-15-1] of this article, or if he does not wish to stay the execution on such judgment, with condition to pay the costs of such appeal if the judgment appealed from be affirmed. In case there be judgment before the justice against the plaintiff for costs only, and the plaintiff desires to appeal, the bond shall be for costs, conditioned as aforesaid, and in a penalty not exceeding one hundred dollars. In suits for the forcible or unlawful entry upon land, or for the unlawful detention of real estate, if judgment be rendered for recovery of possession of the premises, either with or without damages for detention, the bond shall be in a penalty double the amount of the damages, where judgment has been rendered for damages for the detention, together with an amount sufficient, in the opinion of the justice, or of the circuit or other appellate court or judge thereof, when the appeal is granted by such court or judge, to cover one year's rent of the

premises. In such suits where the judgement is not for damages for detention the bond shall be in a penalty equal to an amount sufficient, in the opinion of the justice, or of the circuit or other appellate court or judge thereof, when the appeal is granted by such court or judge, to cover one year's rent of the premises, and an additional sum of not less than fifty nor more than one hundred dollars.

PROVISIONS OF THE WEST VIRGINIA CONSTITUTION

Article VIII, Section 28:

The civil jurisdiction of a justice of the peace shall extend to action of assumpsit, debt, detinue and trover, if the amount claimed, exclusive of interest, does not exceed three hundred dollars. The jurisdiction of justices of the peace shall extend throughout their county; they shall be conservators of the peace and have such jurisdiction and powers in criminal cases as may be prescribed by law. And justices of the peace shall have authority to take the acknowledgement of deeds and other writings, administer oaths, and take and certify depositions. And the legislature may give to justices such additional civil jurisdiction and powers within their respective counties as may be deemed expedient, under such regulations and restrictions as may be prescribed by general law, except that in suits to recover money or damages, their jurisdiction and powers shall in no case exceed three hundred dollars. Appeals shall be allowed from judgments of justices of the peace in such manner as may be prescribed by law.

QUESTIONS PRESENTED

1. Whether it is logical to provide, as a matter of due process, the right to be represented by counsel in civil cases, and to require such representation in criminal cases, but to deny the right to have a case decided by one learned in the law?

2. Because of the historical antecedents of the present day justice of the peace system, did the framers of West Virginia's constitution intend to include review as a matter of right, and as a matter of choice, in the judicial process.

3. Whether the financial interest of a tribunal in the outcome of a case is so prejudicial as to deny appellant due process of law?

4. If there exists in West Virginia an absolute right of appeal in the justice of the peace system, and if there exists an interest in the appellant in having his case adjudicated by a fair and adequate tribunal, are these interests so significant as to be deemed fundamental?

5. Will due process strike at any bar to access to the courts when a fundamental interest is involved?

6. Given the appellant's fundamental interest in access to the courts, does the state have any compelling interest in maintaining the double bond provision that conditions his access to a court of record?

7. Does the double appeal bond requirement bear a reasonable relationship to the state's interests in protecting monetary judgments, safeguarding its judicial system or offsetting its court expenses?

STATEMENT OF THE CASE

In November of 1968 appellant purchased a used automobile from appellee Graham Motor Company by a conditional sale with the balance due represented by a negotiable promissory note. Subsequent to the delivery of the vehicle and prior to full payment on the contract, appellant encountered numerous mechanical defects in the car, and, after being unable to obtain satisfaction from his vendor, appellant repudiated his agreement with appellee. Appellant then made no further payments on the contract.

On October 23, 1969, appellant received notice to appear in the court of appellee Justice of the Peace George Warner in order to answer a law suit filed against him by appellee Graham Motor Company. Appellant appeared and asserted various defenses to Graham Motor Company's claim upon the above described contract, however judgment was cast against appellant in the amount of three hundred dollars ($300.00). Appellant, believing an injustice had been worked against him, sought to appeal his case in order to be heard before a learned judge in a court of record. But, in order to perfect his appeal, appellant was required to satisfy a statutory bond requirement in the amount of six hundred dollars ($600.00), twice the amount of the judgment. Because of appellant's poverty he was unable to meet this condition of appeal.

Prior to execution upon the judgment, appellant sought, and was granted a hearing by a three-judge Federal District Court upon his application for injunctive and declaratory relief on grounds that his civil rights were being denied. There it was held that the double-bond to appeal provision in the West Virginia Code was constitutional, and all relief was denied. This appeal was then filed.

SUMMARY OF ARGUMENT

The West Virginia Constitution provides for what is in essense two systems of trial courts in the state: courts of record, and courts not of record. The latter is a justice of the peace system, an anachronism which provides only for a hearing before a lay-judge. Because a justice of the peace with civil jurisdiction was unknown at common law, the state constitution further provides for review of the decision made by the lay-judge in a court of record before a learned-judge. This review, a trial de novo, also allows the appellant to be heard in a tribunal that has no pecuniary interest in the outcome of the case. However, when the framers of the West Virginia Constitution provided a litigant access to the system of courts of record, they also allowed the state legislature to regulate an appellant's avenue to such a hearing by procedural devices. Appellant contends that the imposition of a statutory double appeal bond is not a reasonable regulation and denies him due process and equal protection of the law.

In the due process argument appellant contends that because of the nature of the justice of the peace system, appellate review is part and parcel of the whole hearing process, and therefore rises to a fundamental interest that may not be denied by an arbitrary cost requirement that impedes access of an indigent to a fair and adequate hearing.

In the equal protection argument appellant asserts that the double bond requirement infringes upon his fundamental interests in access to the courts and cannot be justified by either a rational or a compelling state interest.

I.

DUE PROCESS DEMANDS A HEARING APPROPRIATE TO THE NATURE OF THE CASE, AND BECAUSE OF THE NATURE OF THE JUSTICE OF THE PEACE SYSTEM, A MEANINGFUL HEARING INCLUDES APPELLATE REVIEW.

The justice of the peace system as originally instituted in the United States played an important role in local law enforcement. In the formative years of this country the lack of attorneys and the relative isolation of the various settlements along the eastern seaboard required the transplanting of a system of readily accessible small courts from their origin in medieval England to the American Colonies. And for these same reasons the framers of the West Virginia Constitution saw fit to retain the office of justice of the peace. Silverstein, *Small Claims Courts versus Justices of the Peace*, 53 W. Va. L. Rev. 241, 242 (1956). Thus the State Constitution now provides for what is in essence two systems of trial courts: courts of record–circuit courts and various inferior tribunals–and courts not of record–justices of the peace. Constitution Article 8, Section 1; *Richmond v. Henderson*, 48 W. Va. 389, 398-399, 37 S.E. 653 (1900).

Courts not of record are presided over generally by a lay judge. See *State ex rel. Moats v. Janco*, ___ W. Va. ___, 180 S.E. 2d 74, 78 (1971); and since a justice with civil jurisdiction was unknown at common law, *Richmond, supra*, Article 3, Section 28 of the State Constitution provides for review of a justice's decision in a court of record. However, when providing an avenue to a court of record, the framers allowed the legislature to prescribe the manner in which an appeal may be taken. The

question posed here is whether the double-bond requirement, Code 50-15-2, is merely a procedural device that regulates appellant's access to the courts or whether it acts as a bar to the entire process and is therefore in excess of a legislature's power to regulate judicial procedure.

A. The Decision of A Justice of the Peace, Because of His Lay-Judge Status, Does Not in and of Itself Deny Due Process, But the Bar To Review of Such A Judgment by A Learned Judge Is Contrary to Due Process of Law.

The justice system in England had special safeguards to prevent abuses that were never adopted in West Virginia. For example the selection and qualification of the justice was all important. As one commentator has pointed out:

> "two or three of the best reputation in each county" were to be selected. They were to be "of the best reputation and most worthy men in the county", and as if even that had proved inadequate more stringent requirements were set up by a later statute which ordered them to be "of the most sufficient knights, esquires, and gentlemen." Curl, *A Challenge For Unremitting Activity for Reform of Lower Courts*, 50 W. Va. L. Q. 106, 121 (1947).

However, today, as the West Virginia Supreme Court noted in *State ex rel. Moats v. Janco, supra*, there are no qualifications prescribed for justices of the peace. Neither the state constitution, state statutes nor the common law set forth any eligibility requirement (except that he "shall reside in the district for which he is elected," Const. Art 8, §27) so that "it is possible, under our

system, to elect to this office a man or woman who can neither read nor write. Just anybody can be elected . . . ." 50 W. Va. L. Q. *supra*, at 112. And, in that as of the time this action arose, and, in that as of the time of this appeal, there is only one justice in the entire State of West Virginia who was or is an attorney,[1] appellant suggests that appellee Justice Warner is not competent to adjudge the underlying merits in this matter to a conclusion without some form of review by a learned judge.

It has long been recognized that attorneys are more capable of handling legal matters than are laymen. This fact is the basis of the constitutional right of a party in a civil suit to be represented and heard by counsel. *NAACP v. Button*, 371 U.S. 415, 429 (1963); *Brotherhood of RR Trainmen v. Virginia*, 377 U.S. 1, 6-7 (1964); *United Mine Workers v. Ill. State Bar Assoc.*, 389 U.S. 353, 356 (1967); *Ward v. Winchester*, 11 Va. L. Reg. 501 (1902). Indeed, the difference in competence is so great that in the area of criminal proceedings this Court has recently determined that lawyers must not only be provided for indigent defendants in felony matters but also in misdemeanors where a loss of liberty is likely. *Argersinger v. Hamlin*, 407 U.S. 25, (1972). There Mr. Justice Douglas, quoting *Powell v. Alabama*, 287 U.S. 45, 68 (1932) and *Gideon v. Wainwright*, 372 U.S. 342, 344 (1963) stated:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.

* * * * *

[1] In a negative manner, the official state register, *West Virginia Blue Book*, volumes 53-56 for the years 1969-1972, indicates that Carrol T. Lay of Summersville District, Nicholas County, is the only licensed attorney in the office of justice of the peace.

> . . . in our adversary system of criminal justice any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. 407 U.S. at 31.

Surely it is illogical to guard so jealously a party's constitutional right to be represented in civil and criminal matters, and yet to forbid the party by what purports to be a procedural device from having his case heard by an attorney judge. To suggest that the lawyer's role is somehow constitutionally more significant than the role of the judge renders the right to counsel of little avail if the presiding judge is incapable of understanding arguments advanced by counsel. *Cf.* 50 W. Va. L. Q. at 121. (remarks of Judge Simms)

The distinction in ability between an attorney-judge and lay-judge was recognized by the Court in a case involving what has traditionally been regarded as a civil matter: juvenile proceedings. *In re Gault* 387 U.S. 1, 17 (1967). In *Gault* this Court took special note of the general absence of judicial qualifications in juvenile matters, and particularly the non-attorney status of many juvenile judges. 387 U.S. at 14, fn. 14. This lack of "expertise, the keystone of the whole venture," led the Court, among other things, to conclude "that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *Id.* at 18.[2] What is left then in the lay-judge situation, is not

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[2]In 1900 the West Virginia Supreme Court in *Richmond v. Henderson, supra*, noted the disparity between courts of record (presided over by a learned judge) and a justice of the peace court (presided over by a lay judge) when it was concluded that because the justice system with civil jurisdiction was unknown at common law, and a (then) recent amendment to the state constitution did not elevate the status of the justice court to that of a court of

rule by law but a latitude of decision-making that may best be characterized as rule by fiat.

While the advantages of rule by law vis-a-vis rule by fiat should be apparent, they were succinctly stated by Dean Pound as:

> "*Administration of justice according to law has six advantages:* (1) Law makes it possible *to predict* the course which the administration of justice will take; (2) *Law secures against errors of individual judgment*; (3) Law *secures against improper motives* on the part of those who administer justice; (4) Law *provides* the *magistrate with standards* in which the ethical ideas of the community are formulated; (5) Law gives the magistrate the *benefit* of all the *experience* of his predecessors; (6) Law *prevents sacrifice of ultimate interests, social and individual, to the more obvious and pressing but less weighty immediate interests*." Pound, "Justice According to Law," *Essays on Jurisprudence from the Columbia Law Review* 230 (1963). [Emphasis added.]

Unfortunately the untrained judge is usually not able to take advantage of principle and procedure and often is faced with difficulties which are described below:

> "With no training in the law, no training in the process of judicial thought, and no mental habit of mind acquired by constant experience in legal reasoning, it would indeed be strange if a [lay

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record, the constitutional prohibition against a review of facts found by a jury was inapplicable to a jury verdict in a justice of the peace court. 481 W. Va. at 398-399. *Cf. Bendheim Bros. & Co. v. Baldwin*, 73 Ga. 594 (1884) (Suggesting that lay judge should not even undertake to instruct a jury because of a lack of legal knowledge); *People ex rel Mann*, 97 N.Y. 533 (1892) (commenting on the historic administrative function of a justice and the gradual accretion of judicial function.)

> judge] did not treat each case as a unique proposition. He has no category or class into which he may place it, no analogies from which to draw to solve the new problem before him. He has no legal rules, principles or standards by which to judge the merits of the controversy to be decided. Wholly unlike the judge who is trained in the law, he has no precedents to guide him. In deciding the cause before him, the lay judge is necessarily limited by his own personal experience acquired in the short span of a single lifetime. He cannot call on the legal experience of the ages to assist him but is helpless to any more than apply his own personal notions of right and wrong to the case at hand. The justice which such tribunal is capable of dispensing is but the outcropping of the experiences of a personality, often limited and warped by passion and prejudice, and at best, as variable as the personalities of the justices who comprise [the system] . . . . Such justice is not justice at all. It is unequal, uncertain, and capricious. Smith, *The Justice of the Peace System*, 15 Cal. L. Rev. 118, 127-128 (1927) (quoting from Pound, *Outlines of Lectures on Jurisprudence*) (3rd ed.) 75.

While it may occur in some quarters to argue that the inability to comprehend the nature of a legal defense is a quality which might also be found in attorney-judge, and that there are laymen, and undoubtedly many self-educated men, who could render competent judgment, this presupposes that formal legal training and experience are totally irrelevant in legal decision making. The fact that error may exist in the administration of justice by learned men cannot justify a system in which the frequency of error is multiplied by the lack of expertise. This is particularly true when the possibility for redress may be foreclosed by a cost requirement.

To be sure, appellant does not contend that the fact appellee Warner is not an attorney violates his right to due process. *State ex rel Moats v. Janco, supra.* But he does contend that given the nature of the justice of the peace system his right to be heard includes the appellate process.

The essence of due process under the Fourteenth Amendment is the right to be heard "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 300 U.S. 545, 552 (1966), in a "hearing appropriate to the nature of the case," *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In 1899 this Court, in *Capitol Transaction Co. v. Hof*, 174 U.S. 1, considered the nature of a meaningful hearing in the District of Columbia justice of the peace system. There it had been contended that Capitol, who was the defendant in an action in a justice court, was being denied its Seventh Amendment right to trial by jury because a jury before a justice of the peace was unknown at common law and therefore it would not receive a fair hearing. This was notwithstanding the fact that Hof had demanded a jury trial and a jury of twelve was convened. Capitol argued that this was not the common law jury required by the Seventh Amendment.

Mr. Justice Gray delivered the opinion of the Court and agreed wih Capitol's argument. A jury free from all judicial control (the justice was not a judge) was not known at common law, 174 U.S. 39, but, citing a line of state decisions, he found that a fair trial was not dispensed with because the liberty of appeal, and trial de novo, preserved the right to a hearing before a common law jury. Id. at 42-43. And, in conclusion, the Court found that the fair hearing–trial by jury–was not unduly obstructed by "security to pay and satisfy the judgment." Id. at 45. But, the size of the bond there was only

"an undertaking to pay and satisfy whatever final judgment may be recovered in the appellate court." Id. at 42. Further, it was held in the state decisions to which Mr. Justice Gray referred that:

> A law containing arbitrary and unreasonable provisions, made with the intention of annihilating or impairing the trial by jury, would be subject to the same considerations as if the object had been openly and directly pursued. Citing *Beers v. Beers*, 4 Conn. 535, 539-540 (1823), 174 U.S. at 28.

Thus it was implied that a monetary hurdle would be questionable even though Mr. Justice Gray was satisfied that because the appellate process afforded the Seventh Amendment Constitutional requirement Capitol was afforded a hearing appropriate to the nature of its case.

Subsequently, in 1900, the West Virginia Supreme Court, relying heavily upon the opinion in *Hof*, decided that Article VIII, Section 28 of the West Virginia Constitution provides the right of appeal from a justice of the peace on law and fact notwithstanding the presence of a jury below. *Richmond v. Henderson*, 48 W. Va. 389, 37 S.E. 653. The reasons assigned in the state decision were several. First, Judge Brannon for the Court pointed out that a justice of the peace with civil jurisdiction was unknown at common law and therefore a jury trial was not necessary below. 48 W. Va. at 398. Second, since the jury was not necessary and since its existence at the justice of the peace level was only the result of an addendum to the constitutional article creating the justice's jurisdiction, that addendum did not have the effect of equalizing a justice of the peace court with the court of record. *Id.* at 399-400. Third, he held, in effect, that a jury before a justice was not a jury because only a jury of twelve was known at common law. *Id.* at 402.

Ergo, the constitutional prohibition against review of a jury's findings did not apply to the justice of the peace system. Finally, the court interpreted the language of the constitutional right to appeal in regard to the nature of the hearing on review as follows:

> "Appeals shall be allowed from the judgments of justices of the peace in such manner as may be prescribed by law." [West Virginia Constitution Article VIII, Section 28.]
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> Now, everybody knows that the legal signification of "appeal," unless the context otherwise manifests, means an appellate process which opens the former judgment and verdict, and sends the case to a higher court for trial *de novo* upon the same facts, or new facts, regardless of the former trial. When the Constitution thus granted an appeal as broad as the whole field of a justices jurisdiction, without any qualification except as the legislature might prescribe, it meant that such appeal should have its ordinary function and efficacy to retry any case, on law and fact, to which the legislature might extend it. It did not tie the power of review down by saying that it should not be made except by the rules of the common law. It applied no limitation; it unreservedly gave this appeal with all the legal incidents of that appeal, one of which is the power to retry questions of fact. *Id.* at 404.

Judge Brannon's decision was grounded not only upon *Hof*, but also on an earlier state opinion in *Evans v. Taylor*, 28 W. Va. 184 (1886), where it was held that the procedure denominated "appeal" is in actuality the removal and transfer of the controversy to a court of record for a second complete hearing. The "appeal" operates so as to vacate the judgment of the inferior tribunal and "renders it ineffectual as the foundation of

an action." 28 W. Va. at 188. These statements provided a basis for Judge Brannon's ruling that because the office of justice of the peace was not rooted in the common law, as was the court of record, there can be no equating of the two systems, and therefore one has an absolute right of review in a court of record. Appellant's right of appeal then, is a fundamental part of the entire judicial process in the justice of the peace system under decision of this Court and the State of West Virginia.

B. The Appellate Process Offers the Only Viable Avenue of Attack Upon the Decision of A Justice of the Peace That Is Void Because He Possesses A Financial Interest in the Outcome of Appellant's Case.

Even before appellee Graham Motor Company instituted the action against appellant in the court of Justice Warner it was favored with the likelihood of success: Chapter 50, Article 17, Section 1 provides, in paragraphs (2) and (9), fees that accrue to the justice only on judgment for the plaintiff.[3] Specifically, paragraph (2) allows $2.50 to be collected

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[3] In *State ex rel Moats v. Janco*, ___ W. Va. ___, 180 S.E.2d 74, 87 (1971) Judge Browning in his dissent stated: "[I]n civil cases the justice receives compensation for trial of the case regardless of whether he finds a judgment for the plaintiff or the defendant just as in a criminal case, but if he finds judgment for the plaintiff, it is probable, not just "remotely possible," that under the provisions of Chapter 50 of the Code, the justice may receive additional costs of "fees," for example, for issuing execution upon the judgment for sale of the defendant's property to satisfy the judgment or for attachment of the defendant's wages to satisfy the judgment. The possibility of additional financial enrichment by finding a verdict for a plaintiff in a civil case far exceeds that for finding a defendant

> For all services in connection with an execution on judgment, suggestion on judgment, execution and garnishment whether execution be without garnishment or suggestee execution.

And paragraph (9) provides 35¢ "For mailing each suggestee execution by registered and/or certified mail and return receipt requested." This 35¢ fee is in addition to postage and other supplies regularly provided by county courts to Justice of the Peace courts. Code 50-19-3.

This Court has held that where a case arises

> which would offer a *possible temptation* to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice clear and true . . . .

that possibility of bias violates due process of law. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). [Emphasis added.]

The *Tumey* "possible temptation" rule was recently quoted with approval in *Ward v. Village of Monroeville, Ohio*, ___ U.S. ___, 93 S.Ct. 80, 83 (1972), wherein convictions in traffic cases were overturned because the mayor, who sat as traffic court judge, had a possible interest as chief executive of the municipality that derived substantial revenue from "fines, forfeitures, costs and fees" imposed by the mayor's court. ___ U.S. ___, 93 S.Ct. at 82. While the benefits to the mayor personally

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guilty of a charge of drunk driving, or for any other misdemeanor. A litigant may be deprived of due process of law in a civil case as well as in a criminal case."

were only indirect, the possible temptation to him in his official capacity rendered his decisions invalid.

In West Virginia, as a matter of state law, this test is stringently applied:

> Where a justice of the peace has *any* pecuniary interest in *any* case to be tried by him, *however remote*, he is disqualified from trying such case. *Janco, supra*, 180 S.E.2d at 80. [Emphasis added.]

Indeed, the ancient maxim *nemo debit esse judet in propria causa*, no man shall be a judge in his own cause, is so strictly applied that any possible temptation renders the judgment void *ab initio*. *Id.* at 81.

Although the underlying judgment against appellant may be void, appellant cannot just ignore the matter and expect it to go away. He has two choices: (1) invoke his constitutional right to appeal, which vacates the judgment and restores the original position of the parties prior to judgment, *Evans v. Taylor, supra*, 28 W. Va. at 188, or (2) attack the judgment collaterally by invoking equitable remedies. The latter course of action would also restore the status quo; the judgment would be declared void—assuming an equitable remedy, traditionally a matter of discretion, would be granted—and the appellee Graham Motor Company could again sue appellant before the same justice. But, as has been demonstrated in argument I, A, the best interests of appellant are served by obtaining a hearing before a learned judge in a court of record.

Paradoxically appellants position in this regard is analogous to that of the municipality in *Ward, supra*. There it was argued that notwithstanding the possible bias of the mayor-traffic court judge, any unfairness at the trial level could be corrected on appeal and trial *de novo*. ___ U.S. ___, 93 S.Ct. at 83-84. Mr. Justice Brennan,

however, rejected this proposition and stated that the possibility of reversal on appeal does nothing to assure a fair trial below. *Id.* Moreover, the West Virginia Supreme Court in *Williams v. Brannen*, 116 W. Va. 1, 5, 178 S.E.67 (1935); in considering the "curing" of a justice's interest in criminal cases by appeal and trial *de novo*, concluded that appeal was insufficient because "It is ordinarily cheaper to pay a moderate fine than to pay the expenses attendant upon an appeal." *Cf.* 50 W. Va. L. Q. at 122. While these principles may apply here also, appellant believes that he may only obtain a fair trial before a *learned* judge, and thus the only viable avenue of attack for him is to exercise his right of appeal in order to be heard in a court of record.

II.

THE INTERESTS OF THE APPELLANT IN REVIEW OF THE JUDGMENT OF A JUSTICE OF THE PEACE IS PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. The Nature of the Appeal Bond Requires Access to a Court of Record for the Appellant

The bond appellant faces may be posted in three ways: (1) cash of $600, (2) a property bond of $600, or (3) a commercial surety bond at a cost to appellant of approximately six percent. Choice (2), the property bond, presupposes that the appellant has property of that value, but the facts have shown that appellant is indigent. The second choice also presupposes that appellant is able to prevail upon a non-indigent friend or relative to undertake such a risk for him. And indeed it is a risk:

Code 45-1-4 provides that one liable as a surety on a judgment shall pay on motion of the obligee the amount awarded, *plus* five percent damages, and interest. Moreover, in West Virginia a paid judgment cannot be enforced against the appellant by his surety under the subrogation rights provided by the statute. *Greenbrier Valley Bank v. Holt*, 114 W. Va. 363, 171 S.E. 906 (1933). Thus the state law provides a considerable deterrent to appellants exercise of this option.

This monetary risk of a surety on appeal is assumed by a professional bondsman in choice (3) because he charges a nonrefundable premium. Such a loss of funds, the premium, in order to obtain the fair tribunal that appellant believes he is entitled to, was found by one court to be a taking of property without due process of law under the *Sniadach* rationale. *Brooks v. Small Claims Court*, 105 Cal. Rptr. 785, 789, ____ P.2d ____, 41 U.S.L.W. 2391 (1973). Similarly, choice (1), cash, would also cause appellant to lose the beneficial use of his property pending a hearing before a learned and unbiased judge. Thus the effect of the bond upon appellant is clear: he must suffer a loss of his property pending a fair hearing in a fair tribunal. Appellant contends that considering the effect of the bond upon appellant and the function of the bond under state law, the means employed under the challenged statute do not justify the end.

The function of the appeal bond in the West Virginia Justice of the Peace System is to provide "security which the statute substitutes in place of the advantage which the plaintiff gains by the judgment. It is because of this security that the judgment is vacated," *Chewning v. Tomlinson*, 105 W. Va. 76, 78, 141 S.E. 532 (1928). Thus counsel for appellee is simply incorrect in his suggestion that in West Virginia the bond is not a

substitute for the judgment gained by Graham Motor Company (Motion to Dismiss at 7); and appellee was further incorrect by suggesting that the bond is to safeguard a judgment to which the plaintiff is rightfully entitled (*Id.* at 12). The plaintiff has no proprietary right in his judgment; he is not entitled to his judgment because it has been found that in any civil action the defendant may appeal

> without any bill of exceptions or certificate of evidence, without any manifestation of error of law on the record, simply an appeal as of right, without any assignment of error or showing of error, which appeal of its own force nullifies the verdict and judgment and opens the case for trial de novo upon both law and fact . . . . *Richmond, supra*, 48 W. Va. at 405.

The function of the bond then is not just to indemnify the victor from further trouble upon appeal and to secure him from loss, but to provide the appellant with access to a court of record for a final determination of the issues involved. Thus a single bond, designed to cover the "advantage" which the plaintiff gains by his judgment as employed in the District of Columbia and approved by this Court in *Hof*, would suffice.

B. Because Appellant Has Been Denied A Fair and Adequate Trial Due Process Will Strike at Any Impediment to A Hearing Appropriate to the Nature of Appellant's Case.

Appellant has attempted to demonstrate in the foregoing sections of his argument that there are strong reasons for appellate review in the West Virginia justice of the peace system. First, there is a state constitutional right of review which arises in part because of the lay

judge status of a justice. Second, the lack of expertise in matters of law may cause a party asserting sophisticated legal arguments to suffer because the justice fails to recognize a valid defense. And third, because of a statutory method of compensating justices, the lay judge has some degree of prejudice against the defendant in civil matters. These last two defects, which create a reasonable possibility of error, in and of themselves work a denial of due process.

In the oft cited and quoted opinion of Mr. Justice Black in *In re Murchinson*, 349 U.S. 133 (1955), it was said that:

> A fair trail in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness . . . [T]o perform its high function in the best way "justice must satisfy the appearance of justice." [Citations omitted, emphasis supplied in *Estes v. Texas*, 381 U.S. 532, 543, (1965).]

This principle of absolute fairness in the judicial system has been used again and again to strike down prejudicial procedures. Mr. Justice Clark summarized many of these cases in *Estes v. Texas, supra*, wherein a conviction in a widely televised and highly sensational criminal trial was reversed because of the prejudice attendant to the publicity. There he quoted Justice Taft in *Tumey v. Ohio, supra*, that "possible temptations" that may result in partiality constitute a denial of due process. 381 U.S. at 543. And this rule, he noted further, was applied in *Turner v. State of Louisiana*, 379 U.S. 466 (1963); *Rideau v. State of Louisiana*, 373 U.S. 723 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963), and

White v. Maryland, 373 U.S. 59 (1963). In each of these cases "the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it." *Id.*

More recently in *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971), Mr. Justice Douglas, giving the opinion of a unanimous Court, found that a judge who was the subject of highly personal aspersions giving rise to contempt charges had become so embroided as to make him unfit to sit in judgment. 400 U.S. at 465. The principle, as Mr. Justice Burger implied in his concurring opinion, is that "In every trial there is more of stake than just the interests of the accused; the integrity of the process" . . . is also at stake. 400 U.S. at 468. Thus any inherent defect which creates even the possibility of error is a *per se* violation of due process of law.

The imperfect conditions in the justice of peace system coupled with the absolute state right of review constitute a fundamental interest in the appellant to access to a court of record. However, before he may obtain the plenary hearing in a court of record to which he is entitled, appellant must satisfy the challenged appeal bond. *Staats v. McCarthy*, 130 W. Va. 240, 43 S.E.2d 826 (1947); *Worley v. Easley*, 123 W. Va. 1, 13 S.E.2d 158 (1941); *Wilfong v. Jackson*, 120 W. Va. 328, 198 S.E. 134 (1938); *Powell v. Miller*, 41 W. Va. 371, 23 S.E. 577 (1895).

Access to the courts as grounded in the due process clauses of the Fourteenth and Fifth Amendments has been the subject of considerable discussion in this Court since *Boddie v. Connecticut*, 401 U.S. 391 (1971). See *Ortwein v. Schwab*, ___ U.S. ___, 93 S.Ct. 1172 (1973); *U.S. v. Kraus*, ___ U.S. ___, 93 S.Ct. 631

(1973); *Huffman v. Boerson*, 406 U.S. 337 (1972); *Frederick v. Schwartz*, 402 U.S. 937 (1971); *Meltzer v. LeCraw*, 402 U.S. 654 (1971); *Beverly v. Scotland Urban Enterprises*, 402 U.S. 955 (1971). In *Boddie* Mr. Justice Harlan, writing for the court, stressed the state's monopoly over the means for legally dissolving a marriage, and since "a meaningful opportunity to be heard" was firmly imbedded in our due process jurisprudence, Connecticut's refusal to admit good-faith divorce plaintiffs to her courts was a denial of the opportunity to be heard and a denial of due process. 401 U.S. at 377.

Subsequently in the *Kras* opinion, delivered by Mr. Justice Blackmun, it was pointed out that *Boddie* did not mean that access for all individuals to the courts is a right guaranteed by due process in all circumstances. ____ U.S. ____ , 93 S.Ct. at 636. The test, as suggested by *Kras* and *Ortwein*, is whether (1) the litigant's interest is fundamental, (2) resort to the courts is the sole path of relief, and (3) governmental control over the relief is exclusive. Appellant's case satisfies all of these requirements.

(1) As set forth earlier, appellant's right to a hearing in a court of record rises to constitutional significance because (a) the state provides an absolute right of review as part and parcel of the entire process; (b) an inherent defect in the system causes the judge to biased; (c) the judge has no expertise in matters of law which may be before him (as opposed to administrative expertise as in *Ortwein*[4]) Thus at best appellant receives only token access to the courts. Cf. *Ortwein*, ____ U.S. ____, 93

[4]Generally this Court has found that administrative agencies have specialized understanding in their respective fields. Davis, *Administrative Law*, Exhaustion, §20.03; *E.g. Federal Power Commission v. Florida Power & Light Co.*, 404 U.S. 453 (1972) reh den. 405 U.S. 948.

S.Ct. at 1176 (Douglas, J., Dissenting), and only a semblance of equal treatment before the courts. See *Chambers v. Baltimore & Ohio Ry.*, 207 U.S. 142, 148; *Barbier v. Connolly*, 113 U.S. 27, 31 (1884); *Gulf v. Colorado & Sante Fe Ry. v. Ellis*, 165 U.S. 150 (1897); *Truax v. Corrigan*, 257 U.S. 312 (1921) (the fundamental interest in equal treatment before the courts).

(2) The facts demonstrate that appellant sought to resolve his dispute with his creditor by repudiating the contract, but for appellee this solution was not satisfactory and suit was filed. Thus Mr. Justice Harlan's statement obtains.

> Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one. In this posture we think that this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum. *Boddie* at 376-377. Quoted with approval in *Kras*, ____ U.S.____ , 93 S.Ct. at 637. Cf. *Boddie* at 387 (Brennan J. concurring in part).

(3) Like *Boddie*, and unlike *Kras*, 93 S.Ct. at 638, appellant has no alternative but to submit the underlying controversy to West Virginia's legal system. He may not negotiate reasonably with his opponent because he has no bargaining position; the creditor knows that "J.P." in West Virginia means "judgment for the plaintiff," 48 W. Va. L. R. at 243, and therefore there is no reason for Graham Motors to compromise with appellant. And it should be noted that it was Graham Motors that choose the legal system wherein the controversy would be

settled: courts not of record as opposed to courts of record. Both systems of trial courts had concurrent jurisdiction in this matter. See *Richmond v. Henderson, supra*, 48 W. Va. at 401.

Appellant submits that there is no countervailing governmental interest that overrides appellant's interest in access to the court. Counsel for appellee has suggested in their motion to dismiss that the purpose of the bond is to protect the plaintiff when "there is no merit in the appeal". (Motion p. 7). But the West Virginia Supreme Court has said that there need not be any merit to appellants appeal: there need not be ". . . any manifestation of error of law or the record, simply an appeal as of right, without any assignment of error of showing of error. . ." *Richmond* at 405. If the challenged statute has the winnowing effect appellee suggests it should, this flies in the face of the underlying reasons for the appeal, and there can be no justification for having any bond at all.

III.

SINCE THE STATUTORY DOUBLE APPEAL BOND REQUIREMENT INFRINGES UPON APPELLANT'S INTERESTS IN ACCESS TO THE COURTS AND CANNOT BE JUSTIFIED BY EITHER A RATIONAL OR A COMPELLING STATE INTEREST, IT THEREFORE CONTRAVENES APPELLANT'S CONSTITUTIONAL GUARANTEE TO EQUAL PROTECTION OF THE LAWS.

The statutory appeal bond provisions challenged herein create two classes of civil litigants depending upon their initial judicial forum. Chapter 50, Article 15, Section 2 of the West Virginia Code would impose a double appeal bond requirement on those civil litigants who wish to appeal a justice of the peace court decision. *Staats v.*

McCarty, supra, while Chapter 58, Article 4, Section 13 of the Code provides that to appeal from a court of record a party need only post an appeal bond "in a penalty to be fixed by the court or judge." As a practical matter the appeal bond under the latter statutory provision is generally set at the amount of the judgment. See generally *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949); *Gaines v. Hawkes*, 153 W. Va. 471, 170 S.E.2d 676 (1969). The more rigorous double appeal bond requirement works a particular hardship on the poor individual who seeks to appeal from a justice of the peace court because he may be unable to post the higher bond and is thus unable to secure access to a court of record.

In West Virginia in actions to recover money the plaintiff has a choice of initial forums since justice of the peace courts and circuit courts have concurrent jurisdiction in matters involving less than three hundred dollars. West Virginia Code 50-2-1; 51-2-2.

> It will be asked, why should A suing in a circuit court upon a promissory note for three hundred dollars have a jury, whereas B suing on a like note before a justice not have a jury. The answer is B has chosen a forum of a different nature from the circuit court. *Richmond v. Henderson, supra*, 48 W. Va. at 401.

Because appellant's creditor chose to sue him before a justice of the peace, he was faced with the more onerous double appeal bond requirement before he could appeal the adverse decision to a court of record. Whereas, had appellant's creditor chosen to sue him in a court of record, he only would have been faced with a bond of approximately half the amount of the challenged bond in order to appeal his case. Cf. *Gaines v. Hawkes, supra*. The

difference in the initial forum—a matter of choice for the plaintiff-creditor—is that the appellant, who is poor, may not have the opportunity to appear in a court of record and have his defenses determined by an unbiased and learned judge because of the appeal bond.

Under the Equal Protection Clause the constitutional validity of these classifications depend upon whether the classification is reasonably related to a legitimate state interest or, alternatively, if a fundamental interest is involved, whether the classification can be justified by a compelling state interest. Where statutory classifications exist, this court has generally inquired whether the challenged classification is reasonably related to a legitimate state purpose. *McGowan v. Maryland*, 366 U.S. 420 (1961); *McDonald v. Board of Education*, 394 U.S. 802 (1969). This doctrine was succinctly set forth in *James v. Union Guano Co.*, 264 U.S. 171 (1924) by Mr. Justice Butler:

> The Fourteenth Amendment does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of the distinction if real, and the condition imposed has a reasonable relation to a legitimate object. 264 U.S. at 181.

However, where the challenged classification has touched upon an individual's fundamental interests, this Court has applied a stricter standard and required a showing of a compelling state interest in order to justify the statutory distinctions. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Kramer v. Union Free School District*, 395 U.S. 621 (1969). The appellant contends that the more stringent compelling state interest test is applicable here since the challenged appeal bond infringes the appellant's right of access to the courts.